In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 860

HOWARD BRETT LEVY, PETITIONER

v.

STANLEY R. RESOR, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) and the opinion of the district court (Pet. App. B) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1967. The petition for a writ of certiorari was filed on November 28, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below properly declined to order petitioner's release pending review of his conviction by general court-martial.

285-892—67

STATEMENT

Petitioner, a captain in the United States Army stationed at Fort Jackson, South Carolina, was convicted by general court-martial of wilful disobedience of the order of a superior, making public utterances designed to promote disloyalty or dis-affection among troops, and conduct unbecoming an officer and gentleman, in violation of Articles 90, 134 and 133 of the Uniform Code of Military Justice (10 U.S.C. 890, 934, 933).[1] On June 3, 1967, he was sentenced to three years' confinement at hard labor, to forefeit all pay and allowances, and to be dismissed from the Army. The convening authority, General Roberts, approved the confinement of petitioner pending post-conviction review. Requests, addressed to the Commanding General of Fort Jackson and the Secretary of the Army, that petitioner be released from custody pending review were denied on June 12 and 15, 1967, respectively. Petitioner's conviction is presently under review by the United States Army Board of Review in Washington, D.C.

On June 20, 1967, petitioner filed habeas corpus petitions in both the United States Court of Military Appeals and the United States District Court for the District of South Carolina, seeking release pending review of his conviction. The Court of Military Appeals, on July 7, 1967, denied relief, holding that

[1] Petitioner had sought the convening of a three-judge district court to enjoin the pending trial, but this relief was denied. See *Levy* v. *Cocoran*, C.A.D.C., May 9, 1967, 36 U.S. Law Week 3204 (Pet. App. E), certiorari denied, November 13, 1967 (No. 576, O.T. 1967).

petitioner as a military prisoner had no absolute right to bail and that the decision to keep him in confinement pending review was a reasonable exercise of the Commanding General's discretion under the military regulations (Pet. App. C).

The district court denied the application for bail on July 5, 1967, holding that petitioner was not entitled to release as a matter of right pending review of his court-martial conviction, that the question of custody pending review was committed to the discretion of the commanding officer, and that no abuse of discretion had been shown (Pet. App. B). The court of appeals affirmed (Pet. App. A).

ARGUMENT

1. Both the district court and the court of appeals concluded that petitioner is not entitled as of right to be released pending review of his court-martial conviction. In an independent proceeding, the Court of Military Appeals reached the same conclusion. *Levy* v. *Resor,* 17 U.S.C.M.A. 135 (Pet. App. 9a–20a). The petition discloses no reason for further review by this Court. Even in non-military cases, bail after conviction is not governed by the Eighth Amendment and is thus not a matter of constitutional right. See, *e.g., Ex Parte Harlan,* 180 Fed. 119, 135 (C.A. 5), affirmed, 218 U.S. 442; *United States* v. *Motlow,* 10 F. 2d 657, 662 (C.A. 7); *Bowman* v. *United States,* 85 S. Ct. 232. It is well settled, moreover, that the Eighth Amendment right to bail is inapplicable and inappropriate to courts-martial. *United States* v. *Vissering,* 184 F. Supp. 529 (E.D.

Va.); *United States* v. *Hangsleben,* 8 U.S.C.M.A. 320; Henderson, *Courts-Martial and the Constitution: The Original Understanding,* 71 Harv. L. Rev. 293, 316; Wiener, *Courts-Martial and the Bill of Rights: The Original Practice,* 72 Harv. L. Rev. 1, 285–286. Nor is a right to bail pending review of a court-martial conviction afforded by any statute or regulation. Indeed, the Bail Reform Act of 1966, 18 U.S.C. 3146, 3152(2), expressly excludes courts-martial from its provisions.

There is no merit in petitioner's contention (Pet. 12–14) that he is entitled to be released because his confinement pending appeal will have a "chilling effect" on free expression. The principal crime of which petitioner was convicted—wilful disobedience of the order of a superior to establish a training program in dermatology for Special Forces aidmen—is unrelated to the exercise of First Amendment rights. Confinement after conviction is the normal consequence of conviction by court-martial, and no reason appears why the customary course should not be followed here. As we advised the Court in October, in response to the petition for a writ of certiorari in *Levy* v. *Corcoran,* No. 576, O.T. 1967, certiorari denied, November 13, 1967, the Army Board of Review is prepared to proceed expeditiously in reviewing petitioner's conviction and has stayed its hand solely in response to petitioner's request for a substantial extension of time within which to make his submission.

2. The authority for determining whether convicted court-martial prisoners should be confined pending appeal is vested, under military regulations, in the prisoner's commanding officer. See paragraph 21(d), Manual for Courts-Martial (rules prescribed by the President pursuant to Executive Order 10214, February 8, 1951), quoted at Pet. 4. General Roberts, petitioner's commanding officer, did not abuse his discretion in determining that petitioner should be confined pending review of his conviction. Following his conviction, petitioner was initially confined in the Post Stockade at Fort Jackson where he was stationed. Shortly thereafter, he was transferred by General Roberts' order to an available room at the Post Hospital and there placed under guard. On June 12, 1967, General Roberts wrote a letter to petitioner's counsel, denying their formal request that petitioner be released on bond pending appeal of his conviction. The General stated (R. I 71):[2]

> In addition to the nature of the restraint imposed upon Captain Levy, I have considered, among other things, the impact upon morale and discipline of military personnel stationed at Fort Jackson and throughout the Armed Services of any removal of all restraint as suggested; my obligation to insure the safety of Captain Levy as long as he remains at Fort Jackson; the fact that under the system of military justice established by the Uniform Code of Military Justice, sentences to confine-

[2] "R." refers to the record of proceedings below, lodged with the Clerk of this Court.

> ment begin when the sentence is adjudged and are uninterrupted by parole or other lifting of the restraint,[3] while under the non-military system of criminal justice a sentence to confinement does not begin until the convicted person is incarcerated; and the very real possibility that Captain Levy's release from restriction would be construed by enlisted personnel as discriminatory since an enlisted man convicted of comparable offenses and under sentences to confinement would not be relieved of all restraint.

Subsequently, General Roberts indicated in an affidavit (submitted by the government as part of its response to the district court's order to show cause) that, in addition to the foregoing factors, he also took account of his "assessment that a high risk of unlawful flight of the accused existed" (R. I 87). General Roberts stated that he based that assessment in part on "[i]nformation received * * * from a confidential source who has furnished reliable information in the past, that Captain Levy had expressed * * * to a close associate: his intention upon conviction to seek bail, and, having been released thereon, to flee the United States to a communist country, seek political asylum therein" and after several years request permission to return to the United States (R. I 87). The General also stated that, in making his decision to keep peti-

[3] Petitioner's service of his sentence of confinement commenced under military law on the date of its imposition and would continue to run if he was released on bail pending appeal, unless a formal suspension of the sentence was ordered by his commander. 10 U.S.C. 857(b).

tioner under restraint pending appeal, he took into account the seriousness of the offenses of which he was convicted, particularly the offense of wilful disobedience of the order of his superior, and the harmful effect upon morale which his release would have (R. I 87–88).

Although petitioner argues (Pet. 11–12) that he should have had a hearing on the veracity of the informant's information, it is clear that there was no necessity for such a proceeding. As the courts below held, the letter and affidavit of General Roberts plainly evidenced a permissible exercise of discretion by petitioner's commanding officer to maintain custody of petitioner pending review of his court-martial conviction.

3. Petitioner's two-year term of service on active duty expired on July 8, 1967, following the decision in the district court. Contrary to petitioner's suggestion, this fact does not entitle him to be treated differenly from other military prisoners. Petitioner, by virtue of his court-martial conviction for crimes committed while on active duty as an Army officer, remains a military prisoner subject to military law as regards his confinement pending appeal. See Article 2(7), Uniform Code of Military Justice, 10 U.S.C. 802(7); *Kahn* v. *Anderson*, 255 U.S. 1; *Mosher* v. *Hunter*, 143 F. 2d 745 (C.A. 10) certiorari denied, 323 U.S. 800; *United States* v. *Nelson*, 14 U.S.C.M.A. 93. Paragraph 11(d) of the Manual for Courts-Martial states the applicable rule:

> Jurisdiction having attached by commencement of action with a view of trial—as by apprehen-

sion, arrest, confinement, or filing of charges—continues for *all purposes* of trial, sentence, and punishment. [Emphasis added.]

4. While this case was pending in the court of appeals, respondents moved in that court for an order permitting them to transfer petitioner to the barracks at Fort Leavenworth, Kansas. It was pointed out that, since the Secretary of the Army was one of the respondents named in the habeas corpus action and was subject to the jurisdiction of the court, the court's jurisdiction would not be affected by the transfer. The reasons for the proposed transfer were set forth in the affidavit of Major General Perez, the Commanding General of Fort Jackson, filed in support of the motion.[4]

The court of appeals (in the same opinion in which it affirmed the denial of the writ of habeas corpus (Pet. App. A)) granted the motion for transfer. The court found that "the transfer would be in accordance with the customary handling" of officer prisoners and that petitioner would not be prejudiced thereby (Pet. App. 4a). An application for a stay of that order was denied by the Chief Justice on December 12, 1967.

There is no occasion for the Court to consider this matter or to order petitioner returned to Fort Jackson from the facility designed to house officer prisoners.

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[4] The normal place for custody of convicted officers is the barracks at Fort Leavenworth which has established facilities for such custody. Fort Jackson has no suitable facilities for the restraint of officer prisoners. Eight men are required per week for guard duty of petitioner on a twenty-four hour basis. The result is loss of manpower and of hospital space which would be needed for medical purposes during the winter months. R. III, 11.

The transfer does not affect the issues in the habeas corpus proceeding. Petitioner makes no showing in support of his general allegation that the transfer will impair his right to counsel on appeal. As in *Levine* v. *Willingham,* 261 F. Supp. 743 (D. Kans.), petitioner here has had ample opportunity to date to consult with counsel regarding his appeal. At this stage of the proceeding there would be no need for continuous personal consultation between petitioner and his attorneys, many of whom, in any event, have their offices at distances far removed from petitioner's former place of confinement.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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